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Supreme Court, U.S.
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No. _____

IN THE SUPREME COURT OF
THE UNITED STATES

JEROME MONTGOMERY,

Petitioner,

-v.-

BARRY D. DAVIS, Warden

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTIONS PRESENTED

Petitioner Jerome Montgomery was convicted by jury of first degree home invasion, receiving and concealing stolen property, and 3 counts of kidnapping. He was found not guilty of armed robbery, conspiracy to commit armed robbery, and carjacking. He was sentenced by Judge Richard Yuille to 12 to 40 years, 10 to 20 years, and 3 sentences of 30 to 50 years.

The Michigan Court of Appeals reversed the major convictions for constitutional violation, but the Michigan Supreme Court reinstated the convictions. The United States District Court denied Habeas Corpus and Certificate of Appealability. The Sixth Circuit Court of Appeals denied Certificate of Appealability.

The questions presented are:

QUESTION 1: IN A HABEAS CORPUS CASE, IN THE CONSIDERATION OF A MOTION TO ISSUE CERTIFICATE OF APPEALABILITY, MAY A UNITED STATES DISTRICT COURT OR COURT OF APPEALS PROPERLY FIND THAT NO REASONABLE JURIST WOULD RULE IN FAVOR OF THE PETITIONER, WHERE TWO JUDGES AT THE STATE COURT OF APPEALS RULED THAT PETITIONER WAS DENIED HIS SIXTH AMENDMENT RIGHTS AND THAT IT WAS PREJUDICIAL.

QUESTION 2: IN A JOINT TRIAL WITH A CODEFENDANT (PETITIONER'S BROTHER) WITH SEPARATE JURIES, WHETHER PETITIONER WAS UNCONSTITUTIONALLY PREJUDICED BY HIS JURY DURING DELIBERATIONS LEARNING OF THE CONFESSION OF PETITIONER'S BROTHER, EXCLUDED FROM PETITIONER'S TRIAL, AND THE GUILTY VERDICT BY THE OTHER JURY FOR HIS BROTHER.

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No. _____

IN THE SUPREME COURT OF
THE UNITED STATES

JEROME MONTGOMERY,

Petitioner

-v.-

BARRY D. DAVIS, Warden

Respondent.

MOTION FOR LEAVE TO FILE
PETITION FOR A WRIT OF HABEAS CORPUS

PETITION FOR HABEAS CORPUS

JEROME MONTGOMERY, Petitioner, by and through his attorney, James S. Lawrence, moves this Court to issue a Writ of Habeas Corpus to review the ruling of the Sixth Circuit Court of Appeals of May 13, 2010 denying a Certificate of Appealability from

the ruling of the United States District Court, Eastern District of Michigan, of September 3, 2009, denying a Petition for Habeas Corpus challenging his convictions and sentences from the Circuit Court for Genesee County, Michigan, entered May 4, 2004.

OPINIONS BELOW

The following rulings or orders are attached: (1) Order of the 6th Circuit Court of Appeals of May 13, 2010 denying Petitioner's Motion for Certificate of Appealability; (2) Order of the District Court of October 27, 2009, denying Petitioner's Motion for Certificate of Appealability; (3) Order of the United States District Court denying Petition for Habeas Corpus, September 3, 2009; (4) Order of the Michigan Supreme Court dated March 29, 2006 reversing the Court of Appeals grant of reversal; (5) Opinion of the Michigan Court of Appeals dated November 22, 2005 reversing the convictions.

STATEMENT OF JURISDICTION

This case began as a criminal prosecution in Genesee County, Michigan, Circuit Court. The original judgment was entered May 4, 2004. The Michigan Court of Appeals reversed some of the

convictions November 22, 2005. The Michigan Supreme Court reinstated the convictions March 29, 2006. The Judgment of the United States District Court denying Habeas Corpus was September 3, 2009. The order of the District Court denying Certificate of Appealability was October 27, 2009. The ruling of the Sixth Circuit Court of Appeals denying Certificate of Appealability was issued May 13, 2010. This Court has jurisdiction under 28 U.S.C. §1254 to review the final judgment of the United States Court of Appeals, see *Hohn v. United States*, 524 U.S. 236 (1998) [Habeas Corpus petitioner can file Petition for Writ of Certiorari regarding Habeas Corpus case where United States Court of Appeals denied Certificate of Appealability].

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by

> law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence."

STATEMENT OF THE CASE

Statement of Proceedings:

Petitioner Jerome Montgomery was convicted of first degree home invasion, receiving and concealing stolen property, and 3 counts of kidnapping, at a jury trial, at which we submit serious constitutional error occurred. Genesee County, Michigan Circuit Court Case No. 03-012258-FC. He was sentenced to 12 to 40 years, 10 to 20 years, and 3 sentences of 30 to 50 years by Judge Richard Yuille on May 4, 2004. He was tried jointly with his codefendant and brother Reginald Montgomery.

The Michigan Court of Appeals reversed some of the convictions November 22, 2005. The Michigan Supreme Court reinstated the convictions March 29, 2006. The Judgment of the United States District Court denying Habeas Corpus was September 3, 2009. The order of the District Court denying

Certificate of Appealability was October 27, 2009. The ruling of the Sixth Circuit Court of Appeals denying Certificate of Appealability was issued May 13, 2010.

Statement of Facts:

The prosecution theory was that the Montgomery brothers and accomplices invaded the home of Deborah Harrington, the manager of a jewelry store, held her husband and son as hostage, and forced her to go to the store (then closed) in Novi where jewelry was taken. Petitioner Jerome Montgomery testified that there was a joint plan to commit larceny from the business, that the Harrington's were in on the plan, and that there was no home invasion or kidnapping.

Leonard Harrington, husband of Linda, testified that he was confronted at his garage in Linden, Michigan by two armed assailants wearing masks over their nose and mouth. He and his wife were tied up and put on the bed. A third man arrived, and began to question the Harrington's extensively about the jewelry store, and when the son would be coming home. When the adult son came home he was tied up as well, and taken into the basement with Leonard, while his wife was told to dress for work. After the men left they freed themselves and contacted police. (T IV, 65-94). He identified both

Montgomery's as involved. (T V, 28). He admitted that at first he did not want the men to get caught so he failed to give the police information he had that would help them catch the men. (T V, 60)

The parties stipulated that jewelry valued over $20,000 was taken. (T V, 3).

The son, Reid Adomat, testified to coming home, being threatened by armed men, and tied up with his father. (T V, 149-156). He testified that the police treated him as a suspect and insisted that this was an inside job. (T V, 180-184).

Deborah Harrington (who is white) testified she was the manager of Jared Galleria, a jewelry store in Novi, Michigan. Men invaded the house, and asked questions about the store. The men used walkie-talkies. They threatened her and her family, and tied them up. She was forced to drive to the store in her vehicle accompanied by one of the men. At his command she put jewelry into a bag, and retrieved the security tape for them. They left her tied up. (T IV, 10-84). She identified Petitioner as the leader. (T VI, 87-88). However, she first told police she did not even know if the offender was an African-American. (T VII, 69-70). She did not give full information to the police at first because she was still afraid of the robbers. (T VII, 99).

Det. Victor Lauria testified that at the photo lineup that included Petitioner's photo she did not

identify anyone. (T VIII, 173).

Petitioner Jerome Montgomery (who is black) testified that in February 2003 he met Deborah Harrington, who was accompanied by his friend Reese (who is white) at a Magic Pan Restaurant on Plymouth Road. They discussed a plan to rob the jewelry store. She drew a map and showed where the most expensive jewelry was kept. He had a second meeting with Deborah at Yolanda Price's hotel room near the store. They made a plan that involved meeting at Deborah's house to take her to the store, and tying up Leonard and Reid so as to give them a plausible cover story, but when he left no one was tied. His companions were Darrell Shipman, Yolanda Price, and Frank. His brother Reginald was not there. None of them wore any masks. He and Deborah went to the store. She unlocked it, and disabled the alarm, and she got jewelry and the security video for him. (T XI, 28-58).

Cassandra Hurst testified that she knew Petitioner from the gym. She saw him at the Magic Pan Restaurant on a Sunday morning in February 2003 dining with a Caucasian couple. (T XI, 186-189).

On Friday, the jury convicted Reginald Montgomery while Petitioner Jerome Montgomery's jury was still deliberating. Defense counsel moved to sequester the jury so they would not find out about

the actions of Reginald's jury. This was denied. (T XIII, 52-53).

On Monday morning the judge received two notes from jurors, one of which asked what would happen if the jury could not reach a verdict. The other, from juror No. 9, said that there were too many outside influences on the jury. Her boss told her that the jury had quickly convicted Reginald, and that Reginald had confessed. She also complained about sympathy and emotion playing a major role in the jury's deliberations. (T XIV, 6-10). Petitioner's motion for mistrial was denied. (T XIV, 13-14).

REASONS FOR GRANTING THE WRIT

QUESTION 1: IN A HABEAS CORPUS CASE, IN THE CONSIDERATION OF A MOTION TO ISSUE CERTIFICATE OF APPEALABILITY, MAY A UNITED STATES DISTRICT COURT OR COURT OF APPEALS PROPERLY FIND THAT NO REASONABLE JURIST WOULD RULE IN FAVOR OF THE PETITIONER, WHERE TWO JUDGES AT THE STATE COURT OF APPEALS RULED THAT PETITIONER WAS DENIED HIS SIXTH AMENDMENT RIGHTS AND THAT IT WAS PREJUDICIAL.

Congress has provided for a Certificate of Appealability to be acquired by a habeas corpus petitioner seeking to appeal the denial of habeas corpus relief. 28 U.S.C. §2253:

> "An appeal may not be taken to the court of appeals from the final order in a habeas corpus proceeding where the detention complained of arises out of process issued by a State court, unless the justice or judge who rendered the order or a circuit justice or judge issues a certificate of probable cause."

The primary rule of statutory construction is to rule in accordance with the legislative intent. See *NLRB v. United Food and Commercial Workers Union*, 484 U.S. 112, 123 (1987): "On a pure question of statutory construction, our first job is to try to determine congressional intent."

We submit he purpose of the certification requirement is to screen out frivolous claims. However, it should not be applied so as to screen out nonfrivolous claims with which the judge disagrees. As the Court held in *Barefoot v. Estelle*, 463 U.S. 880; 103 S.Ct. 3383; 77 L.Ed.2d 1090, 1104 (1983):

> "Obviously, the petitioner need not show that he should prevail on the merits.

> He has already failed in that endeavor. Rather, he must demonstrate that the issues are debatable among jurists of reason; that a court could resolve the issues in a different manner."

This Court held that in such a case, the Certificate should not be denied.

"A court of appeals should be confident that petitioner's claim is squarely foreclosed by statute, rule, or authoritative court decision, or is lacking any factual basis in the record of the case, before dismissing it as frivolous." *Barefoot v. Estelle*, supra, 77 L.Ed.2d at 1105.

While the District Court did reach a conclusion that Petitioner should lose, that alone does not provide cause to deny the Certificate; if it did, no Habeas Corpus petitioner could ever appeal. The District Court's decision was not based on the simple application of clear precedent. The District Court had to engage in considerable analysis to reach its conclusion.

Although the intent of Congress in passing the AEDPA was to curb abuses in the Habeas Corpus system and to accelerate the process, this does not mean that the AEDPA, in disputed cases, should always be interpreted against a Habeas Corpus petitioner.

The approach taken in *Barefoot v Estelle*, was followed and strengthened in *Miller-El v. Cockrell*, 537 U.S. 322; 123 S.Ct. 1029; 154 L.Ed.2d 931 (2003). The Court held that the 5th Circuit wrongly denied Petitioner Miller–El a Certificate of Appealability, and stated:

> "Consistent with our prior precedent and the text of the habeas corpus statute, we reiterate that a prisoner seeking a COA need only demonstrate "a substantial showing of the denial of a constitutional right." 28 U. S. C. §2253(c)(2). A petitioner satisfies this standard by demonstrating that jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further. *Slack*, *supra*, at 484. Applying these principles to petitioner's application, we conclude a COA should have issued."
>
> ...
>
> "This threshold inquiry does not require full consideration of the factual or legal bases adduced in support of the claims. In fact, the statute forbids it. When a court of appeals side steps this process by first deciding the merits of an appeal, and then justifying its denial of a COA based on its adjudication of the

> actual merits, it is in essence deciding an appeal without jurisdiction.
>
> To that end, our opinion in *Slack* held that a COA does not require a showing that the appeal will succeed. Accordingly, a court of appeals should not decline the application for a COA merely because it believes the applicant will not demonstrate an entitlement to relief. The holding in *Slack* would mean very little if appellate review were denied because the prisoner did not convince a judge, or, for that matter, three judges, that he or she would prevail. It is consistent with §2253 that a COA will issue in some instances where there is no certainty of ultimate relief.
>
> After all, when a COA is sought, the whole premise is that the prisoner " 'has already failed in that endeavor.' " *Barefoot, supra*, at 893, n. 4."

In fact, the *Miller-El* court was even more accommodating to Petitioner's position, holding "We do not require petitioner to prove, before the issuance of a certificate of appealability, that some jurists would grant the petition for habeas corpus." Id. at 338. The Court also stated that in some cases, the law required the issuance of a certificate of

appealability even though "every jurist of reason might agree" after plenary consideration that the petitioner will not prevail.

We submit that it is obvious that jurists of reason could disagree about the merits of these issues, which is the only thing to now be decided in Question 1. In addition to the merits of the underlying claim (discussed in Question 2), we have the fact that in the Michigan Court of Appeals, two out of the three judges ruled that Petitioner was denied his Sixth Amendment rights.

The ruling of the Michigan Court of Appeals of November 22, 2005 stated:

> "We find that this trial violated Jerome's Sixth Amendment rights, and he is entitled to a new trial."

Even though the Michigan Supreme Court voted to overturn the Court of Appeals ruling (by a 6-1 vote, not unanimously), we submit the ruling by the two Court of Appeals judges cannot be ignored as if it had never been made. At a minimum, the finding of the two Court of Appeals judges of a prejudicial constitutional violation, in and of itself, shows that reasonable judges could find the prejudicial violation of a constitutional right, because two of them (or three if we include the dissenting

Michigan Supreme Court justice) already did so.

In *Dallo v. INS*, 765 F.2d 581, 589 (6th Cir. 1985), the Sixth Circuit held that "An appeal is frivolous if it is obviously without merit and is prosecuted for delay, harassment, or other improper purpose." The appeal was not being prosecuted for delay or harassment. Mr. Montgomery continues to serve his sentences while appeals are pending. His purpose was not to "harass," but to get a ruling on his federal constitutional claims. It cannot be said that Mr. Montgomery's issues are "obviously without merit," or that he raises them for an improper purpose.

The question of whether a Certificate of Appealability should be denied under these circumstances raises not only a question of fundamental fairness for Petitioner, but also raises a question of broad applicability to Habeas Corpus cases. Does the fact that state court appeals judges ruled in Petitioner's favor on the federal constitutional issue mean something, or mean nothing, in determining whether the issues are clearly frivolous? It is appropriate that the Supreme Court provide some guidance to the lower courts on this question. At this point, the Supreme Court is the only court that can reach this question, and the Habeas Corpus action the only available avenue for proceeding.

The screening process is designed to prevent wholly frivolous claims from being appealed. Where an issue loses, but it was not frivolous to present the issue to the District Court, it is not frivolous to present it to the Court of Appeals. This Court should grant review in this Habeas Corpus case and rule that it was improper to deny a Certificate of Appealability where there was a split of authority among judges as to whether Petitioner should have a new trial.

QUESTION 2: IN A JOINT TRIAL WITH A CODEFENDANT (PETITIONER'S BROTHER) WITH SEPARATE JURIES, WHETHER PETITIONER WAS UNCONSTITUTIONALLY PREJUDICED BY HIS JURY DURING DELIBERATIONS LEARNING OF THE CONFESSION OF PETITIONER'S BROTHER, EXCLUDED FROM PETITIONER'S TRIAL, AND THE GUILTY VERDICT BY THE OTHER JURY FOR HIS BROTHER.

On Friday, the jury convicted Reginald Montgomery while Petitioner Jerome Montgomery's jury was still deliberating. Defense counsel moved to sequester the jury so they would not find out about the actions of Reginald's jury. This was denied. (T

XIII, 52-53).

On Monday morning the judge received two notes from jurors, one of which asked what would happen if the jury could not reach a verdict. The other, from Juror # 9, said that there were too many outside influences on the jury. Her boss told her that the jury had quickly convicted Reginald, and that Reginald had confessed.

Because of this extraneous influence, a hearing was conduct involving Juror #9, but not involving any other jurors. During the hearing Juror #9 indicated there were jurors who could not based their verdict based only on the evidence submitted. (T XIV, 8). Juror #9 also indicated that other jurors during deliberation were "breaking rules" allowing "sympathy and emotions [to play] a big part..." (T XIV, 9-10). The trial court allowed the juror to return for deliberations, refused to allow any questioning of other jurors to see if they knew what Juror #9's boss knew, and denied Petitioner's motion for mistrial.

The District Court mischaracterized the issue by ruling (Opinion, 7):

> "The issue in this case is whether juror nine was impartial or irreparably prejudiced by receiving unsolicited information, outside of evidence admitted at trial, from her boss about Reginald's conviction and confession during jury

deliberations over Petitioner's guilt or innocence."

The issue is whether any members of the jury were affected by the dissemination of information about Reginald, his verdict, and his confession, in this case which received high amounts of local publicity in Genesee County. How many jurors knew about Reginald's verdict or confession? We do not know, because the trial judge refused to question anyone but Juror 9. But if the juror's boss knew, isn't it reasonably likely that information about this highly publicized case would be known to others, heard directly by either the jurors themselves, or by people who knew the jurors?

By refusing to question any of the other jurors about what they may have learned from the news coverage, or from others who heard or saw that coverage, the trial court ensured that any extraneous information held by those jurors would never get on the record. The trial court in this way also ensured that critical evidence casting doubt on the wisdom of his refusal to sequester would remain concealed.

It is understandable that a judge would not relish the thought of a 14 day trial having to be retried simply because the judge rashly decided not to protect the jury from outside influences despite a defense motion. But we submit the commands of the

Constitution must take precedence over that.

The Sixth Amendment to our Federal Constitution provides that in a criminal case, "The accused shall enjoy the right to...trial by an impartial jury." U.S. Const., Amend. VI. Being "fundamental to the American scheme of justice," *Duncan v. Louisiana*, 391 U.S. 145, 149; 88 S.Ct. 1444; 20 L.Ed.2d 491 (1968), the right is binding on the states. *Turner v. Louisiana*, 379 U.S. 466; 85 S. Ct. 546; 13 L.Ed.2d 424 (1965). Central to this principle is that "one accused of a crime is entitled to have his guilt or innocence determined solely on the basis of the evidence introduced at trial, and not on grounds of official suspicion, indictment, continued custody, or other circumstances not adduced as proof at trial." *Taylor v. Kentucky*, 436 U.S. 478; 98 S.Ct. 1930; 56 L.Ed.2d 468 (1978); *Holbrook v. Flynn*, 475 U.S. 560; 106 S.Ct. 1340; 89 L.Ed.2d 525 (1986).

Obviously, Petitioner could not cross-examine what this juror and others may have learned from media reports. The author of the statement was not called as a witness, and Petitioner could not cross-examine him as to the truthfulness of his out of court statement, the circumstances under which it was given, the goals the speaker was trying to accomplish, the pressure put on him. etc.

We submit that the only legitimate way for the jury to be affected by knowledge of Reginald's

conviction and the contents of his statement is for Reginald to be called as a prosecution witness in Petitioner's trial. Having declined to do what would be needed to make Reginald a prosecution witness, the only fair trial would be one where Petitioner's jury would know nothing about the codefendant's statement to police and his jury verdict.

In line with this is the "requirement that the jury's verdict be based on evidence received in open court, not from outside sources." *Sheppard v. Maxwell*, 384 U.S. 333; 86 S.Ct. 1507; 16 L.Ed.2d 600 (1966). As the Court elaborated in Sheppard:

> "Only last Term in *Estes v. State of Texas*, 381 U.S. 532, 85 S.Ct. 1628, 14 L.Ed.2d 543 (1965), we set aside a conviction despite the absence of any showing of prejudice. We said there:
>
> > 'It is true that in most cases involving claims of due process deprivations we require a showing of identifiable prejudice to the accused. Nevertheless, at times a procedure employed by the State involves such a probability that prejudice will result that it is deemed inherently lacking in due process.' At 542-543, 85 S.Ct. at 1632.

> And we cited with approval the language of Mr. Justice Black for the Court in *In re Murchison*, 349 U.S. 133, 136, 75 S.Ct. 623, 625, 99 L.Ed. 942 (1955), that 'our system of law has always endeavored to prevent even the probability of unfairness.'"

The District Court found any error to be harmless because of no prejudice. This finding was contrary to established United States Supreme Court case law and at a minimum presents an issue upon which reasonable jurists could differ. The disclosure of this type of extraneous information as itself prejudicial, being of the kind of information found to be prejudicial by its very nature by the United States Supreme Court in *Leonard v. United States*, 378 U.S. 544 (1964) (per curiam) [prospective jurors who heard trial court announce defendant's guilty verdict in first trial presumed incapable of rendering impartial verdict on second trial on similar charges].

The confession of the Petitioner's brother, inadmissible [for reasons of hearsay and confrontation, *Crawford v Washington*, 541 US 36; 124 S Ct 1354 (2004); *Davis v Alaska*, 415 US 308; 94 S Ct 1105; 39 L Ed 2d 347 (1974)] and not admitted at Petitioner's trial, and the very reason for the separate trials, suddenly became an issue in Petitioner's trial anyway, because it became known

to at least one juror, and perhaps several.

The disclosure of this type of extraneous information (confession by codefendant in a conspiracy case leading to conviction on the same charges) was itself prejudicial, being the very kind of information found to be prejudicial by its very nature by the United States Supreme Court in *Bruton v. United States*, 391 U.S. 123 (1968) [jurors found to be influenced by learning of out of court confession by codefendant, even though they were instructed to disregard it]. The Court in *Bruton* found that "the powerfully incriminating extrajudicial statements of a codefendant" are inherently prejudicial. "Not only are the incriminations devastating to the defendant" but "[t]he unreliability of such evidence is intolerably compounded when the alleged accomplice, as here, does not testify and cannot be tested by cross-examination."

The Court went on to hold:

> "Despite the concededly clear instructions to the jury to disregard Evans' inadmissible hearsay evidence inculpating petitioner, in the context of a joint trial we cannot accept limiting instructions as an adequate substitute for petitioner's constitutional right of cross-examination. The effect is the same as if there had been no instruction at all."

The evidence of the brother's confession would obviously have an impact on the trial because the confession [if known to any jurors] resolved the question of whether the purported victims were kidnapped, or in on the plan, which would decide whether this was a minor property crime or the life offense of kidnapping. It would also resolve for the jurors the question of whether Petitioner's testimony was truthful [he testified that Reginald was not present]. Since that was what the trial was all about, we submit a reasonable jurist could find this prejudicial.

There is a presumption of prejudice from jurors being exposed to facts not in evidence. *United States v. Swinton*, 75 F.2d 374 (8th Cir. 1996) *Nevers v. Killinger*, 169 F.3d 352 (6th Cir. 1999). ""Extraneous influence" has been construed to cover publicity received and discussed in the jury room, consideration by the jury of evidence not admitted in court, and communications or other contact between jurors and third persons, including contacts with the trial judge outside the presence of defendant and his counsel." *United States v. Williams-Davis*, 821 F. Supp. 727 (DDC, 1993).

Moreover, the trial court deprived Petitioner of his ability to demonstrate further prejudice where no

other juror was interviewed or questioned about juror exposure to publicly announced information about the case, disclosed by Juror #9. There was no judicial inquiry into the actions of the other jurors, or what they knew about the jury verdict or the confession, which itself was constitutional error. *Remmer v. United States*, 347 U.S. 227; 74 S.Ct. 450;' 98 L.Ed. 654 (1954); *United States v. Corrado*, 227 F.3d 528, 536 (6th Cir. 2000). It is not reasonable to think that only one juror could have been exposed to this well-publicized case. Certainly it is not reasonable to assume it without inquiry.

See *Nevers v. Killinger*, 169 F.3d 352 (6th Cir. 1999):

> "It is a matter of clearly established Supreme Court precedent that a criminal defendant claiming implied juror bias is entitled to the opportunity to prove actual bias. See *Dennis v. United States*, 339 U.S. 162, 171-72 (1950) ("Preservation of the opportunity to prove actual bias is a guarantee of a defendant's right to an impartial jury."). When a trial court is presented with evidence that an extrinsic influence has reached the jury which has a reasonable potential for tainting that jury, due process requires that the trial court take steps to determine what the effect of such extraneous information actually was

> on that jury. In *Smith v. Phillips*, 455 U.S. 209 (1982), the Supreme Court made it clear that, while no court has the ability to shield jurors from every outside contact or influence that might affect their votes, nonetheless, the trial court has a duty to take steps to ensure that the jury votes solely on the basis of the evidence presented at trial."

While Petitioner does not restrict his argument to Juror #9, the judge imposed an almost impossible task upon that juror: to ignore that she had in her head information that Petitioner lied to the jury about what happened. What reasonable juror could possibly ignore such information, even though there was no cross-examination? Why was the similar action taken by the trial court in *Bruton v. United States* held not to cure the prejudice, but Petitioner's claim that the prejudice was not cured here was ruled frivolous? Were the Justices who decided *Leonard* and *Bruton* acting unreasonably, or were they reasonable jurists who properly resolved the issues in those cases, virtually identical to the issues in this case?

Here the trial court was made aware of juror exposure to information and juror misconduct which involved violations of core duties of determining guilt or innocence based upon the evidence received

during the trial and not based upon sympathy and emotions and failed to inquire of the other jurors precluding and impairing Petitioner's ability to demonstrate prejudice. The failure to interview the other jurors was a due process violation necessitating a new trial. *United States v. Davis*, 177 F.3d 552 (6th Cir. 1999).

In rejecting the issue, the District Court characterized this as being whether the trial court properly believed "protestations of impartiality" by the juror, comparing the case to *Patton v. Yount*, 467 U.S. 1025 (1984). (Opinion, 8). However, the real question was not whether the juror was a biased person, but whether she was in possession of information, not introduced into evidence, and not subject to cross-examination, that would be reasonably likely to influence a verdict.

In *Patton v. Yount*, the information acquired by a few people was old, and the jurors were subject to voir dire about what they knew about the case. This gave defense counsel the opportunity to probe every single juror, and make reasoned decisions about whom to leave on the jury. The Court noted:

> "That time soothes and erases is a perfectly natural phenomenon, familiar to all."

In this case, the information came to light during the weekend break during deliberations. It was fresh information spread to the public at the very time when it was most likely to be damaging. Moreover, it could not have been inquired about during jury voir dire. In this case, only one juror was questioned, unlike in *Patton*.

In *Patton*, this Court ruled:

> "But it is clear that the passage of time between a first and a second trial can be a highly relevant fact. In the circumstances of this case, we hold that it clearly rebuts any presumption of partiality or prejudice that existed at the time of the initial trial. There was fair, even abundant, support for the trial court's findings that between the two trials of this case there had been "practically no publicity given to this matter through the news media," and that there had not been "any great effect created by any publicity."

In this case, not only was there no passage of time, but there was no inquiry into what the jurors were exposed to. We submit that if there was enough publicity to get the information to a juror's boss, there was enough publicity to require inquiry into whether the information got to any jurors. In

Patton, unlike this case:

> "[T]he determination has been made only after an often extended voir dire proceeding designed specifically to identify biased veniremen."

That is what the trial court should have done here, instead of doing everything possible to thwart inquiry.

In this case, unlike in *Patton*, we are not claiming a "wave of public passion." We are claiming exposure to information that a reasonable juror could be expected to consider when determining the issues before them at this trial. It is difficult to square this case with cases such as *Leonard v. United States* and *Bruton v. United States*, which have not been officially overruled, but are now impliedly overruled by the rulings in Petitioner's case. The rulings in *Leonard* and *Bruton* now mean nothing if they can be evaded by instructing jurors, or exacting a promise, that the jurors will ignore compelling evidence known to them.

It is not necessary for Petitioner to show that he would have been acquitted if the error had not been made. Instead, Habeas Corpus relief should be granted if the error "had a substantial and injurious effect or influence in determining the jury's verdict."

In *O'Neal v. McAninch*, 513 U.S. 432; 115 S.Ct. 992; 130 L.Ed.2d 947 (1995), the court held that where there is "grave doubt as to the harmlessness of an error," the Court must grant Habeas Corpus relief. Since knowing that Reginald confessed to that which Petitioner denied would have a substantial and injurious effect on determining whether Petitioner's testimony was truthful, Habeas Corpus relief should be granted. When we add in the effect of knowing the result reached by Reginald's jury, the decision of the Sixth Circuit to deny a Certificate of Appealability becomes close to incomprehensible.

This case should be accepted for review and a ruling issued on the merits to determine whether exposure of a jury to this kind of prejudicial information, officially excluded but known to jurors anyway, can implicate concerns of fundamental fairness, and whether it would reasonably be expected to have an impact on the outcome of the case.

CONCLUSION

This Court should grant the writ of certiorari, and upon review grant Petitioner a fair trial, in accordance with clearly established Supreme Court authority.

Respectfully submitted,

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Dated: _____

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee

UNPUBLISHED
November 22, 2005
No. 255641

v

JEROME EDWIN MONTGOMERY,

Defendant-Appellant.

Genesee Circuit Court
LC No. 03-012258-FC

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee

No. 255689

v

REGINALD EUGENE MONTGOMERY,

Defendant-Appellant.

Genesee Circuit Court
LC No. 03-012257-FC

Before: Saad, P.J., and Jansen and Markey, JJ.

PER CURIAM.

In these consolidated appeals, defendant Jerome Montgomery appeals of right, in Docket No. 255641, from his jury trial convictions for three counts of kidnapping, MCL 750.349, conspiracy to kidnap, MCL 750.157(a) and MCL 750.349, first-degree home invasion, MCL 750.110a(2), and receiving and concealing stolen property having a value of $20,000 or more, MCL 750.535(2)(a). We affirm Jerome's conviction and sentence for receiving and concealing stolen property, but reverse the remainder of his convictions and sentences and remand for a new trial. In Docket No. 255689, defendant Reginald Montgomery appeals as of right from his jury trial convictions for two counts of armed robbery, MCL 750.529, conspiracy to commit armed robbery, MCL 750.157a and MCL 750.529, three counts of kidnapping, MCL 750.349, conspiracy to kidnap, MCL 750.157(a) and MCL 750.349, first-degree home invasion, MCL 750.110a(2), felon in possession of a firearm, MCL 750.224f, possession of a firearm during the commission of a felony, MCL 750.227b, and carjacking, MCL 750.529a. We affirm Reginald's convictions and sentences.

I. Facts

Leonard Harrington and Deborah Harrington testified that on the evening of March 19, 2003, they entered their garage and were approached by two masked men who were armed. According to the Harringtons, the men threatened them, tied them up, and questioned Deborah about the jewelry store in Novi where she was the general manager. Leonard testified that Deborah was told to answer the questions and not lie or they would be killed. The Harringtons both testified that eventually a third man arrived, and Deborah testified that a woman also arrived. Deborah

testified that the third man talked with her about plans to rob the Novi jewelry store. The men remained at the Harrington's home and in the early morning of March 20, 2003, Reid Adomat, Deborah's son, arrived and was apprehended by the armed men.

Deborah testified that in the early morning of March 20, 2003, she was instructed to accompany one of the men to her work, and was told that Leonard and Reid would be held at separate locations as hostages. Deborah further testified that the man threatened her and her family if she did not cooperate. Deborah drove to the jewelry store, where she unlocked the door and the safe. The man who accompanied her loaded up jewelry, bound her, and told her not to the call the police for ten to fifteen minutes. Deborah freed herself after ten to fifteen minutes, and called the police. At the Harrington home, Leonard and Reid claim that they were tied up and placed in the bathroom, but subsequently got loose and ran over to the neighbors' home. The neighbors called 911.

Novi Police Sergeant David Malloy testified that over $1 million in jewelry had been taken from the jewelry store. Jewelry, a fur coat, and other items were also taken from the Harrington's home. A confidential informant gave the police information that Jerome, Jerome's brother, and Yolanda Price were involved in the jewelry store robbery, which led to surveillance of Jerome. A search warrant was executed at a residence linked to Jerome, and approximately $500,000 worth of the jewelry was found as well as items that were missing from the Harrington's home. Subsequently, both Jerome and Reginald were brought in for questioning.

Detective Victor Lauria, from the Novi Police Department and Detective David Dwyre, from the Genesee

County Sheriff's Department, took statements from Reginald and Jerome. Upon being brought in for questioning, Reginald was upset and indicated that he did not want his baby to grow up without a dad. Reginald stated that the robbery had been planned for a month, and indicated that Jerome, Yolanda Price, Lashawn Montgomery, and Darrell Shipman were involved. In his statement, Reginald further explained his involvement as follows: he had a black pistol, was wearing a black mask, approached the Harringtons in the garage and tied them up, later tied Reid up when he arrived, put Reid and Leonard in the bathroom, and did not go with Deborah to the jewelry store. Jerome also gave a statement in which he indicated the incident was not about the house, but was about the jewelry store. Jerome also said that he did not want to be a "snitch," but a male relative came up with the idea.

Leonard identified Reginald, at trial, as one of the men involved who had a gun. Deborah, at trial, identified Jerome as the man who accompanied her to the jewelry store.[1] Jerome acknowledged that he received and concealed stolen property, but his defense was that the Harringtons were involved in the plan to rob the jewelry store.

II. Docket No. 255641

On appeal, Jerome argues that the trial court abused its discretion in denying his motion for a mistrial, which was brought after a juror informed the court that she had been provided information on a break from deliberations that co-defendant Reginald had been convicted on all counts and had

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[1] Deborah did not recognize Jerome in a photographic lineup conducted by the Novi Police Department.

confessed; information that was not admissible against Jerome and contrary to Jerome's testimony that Reginald was not involved. We agree, and find that Jerome was denied a fair trial.

We review a trial court's decision to deny a motion for a mistrial for an abuse of discretion. *People v Cress*, 468 Mich 678, 691; 664 NW2d 174 (2003). "A mistrial should be granted only for an irregularity that is prejudicial to the rights of the defendant and impairs his ability to get a fair trial." *People v Haywood*, 209 Mich App 217, 228; 530 NW2d 497 (1995) (citations omitted).

On March 26, 2004, the juries for both Jerome and Reginald began to deliberate. After less than three hours of deliberating, Reginald's jury reached a verdict, convicting him on all counts. Jerome's jury continued to deliberate and a decision was made to send them home for the weekend. Jerome's counsel requested that the jury be sequestered for the weekend, in light of the fact that information would be available through news sources regarding Reginald's convictions. The trial court denied counsel's request and allowed the jury to go home for the weekend after giving specific instructions.

On March 29, 2004, Jerome's jury returned to deliberate. Subsequently, the trial court received two notes: one wanting to know what would happen if a decision could not be reached and, shortly after, a second note from a juror stating "At this point I feel I've heard too much outside information outside these deliberations that have prevented me from making a fair decision." Jury deliberations were suspended and the trial court brought the juror in to discuss the note. The juror explained:

> When I went to work on Saturday, my boss is aware that I'd been on jury duty, and he's aware of the case just because it's been on the news and the newspapers and that. I've never went over any details. But he had - - when he come in, he says, so you guys have made a decision, thinking that I was the other juror - - jury. And he said wow, it only took you guys like two hours.

The juror further stated that her boss had told her that Reginald was found guilty on all charges and that there was a confession made. The juror indicated that she stopped him at that time. She explained:

> And it didn't - - it didn't really change my decision, it just confirmed it to a point where I wouldn't be able to discuss it, or - - because there are so many people with other opinions. And there's other things going on as well.

Upon further questioning, the juror indicated that she had not provided the information to the other jurors. The trial judge asked the juror if, recognizing the oath, she could separate the information she received from the evidence, and could "continue to deliberate based upon the information received in this only, and set that other information aside?" The juror responded "Personally, yes, but I feel there's other people that cannot." When the trial court further questioned this response, the juror indicated that she did not know if other jurors had outside information that she did, but that the jury was "breaking rules that [the trial court] implied." The juror then explained the jury was not following rules on sympathy and emotions, and that "they're not using common sense."

Jerome's counsel requested that the trial court declare a mistrial because it would be unfair for the jury to continue on with the information regarding Reginald. The trial court denied the request stating:

> I think the law presumes that jurors follow the instructions of the Court when it comes to out-of-court conduct. And I think what we learned from juror number nine confirms that, and that is she did not seek out this information. It came to her in an inadvertent way.
>
> She recognized the oath that she took to decide this case based solely upon the evidence presented in this case. She affirmed that even though this outside information had come to her, that her oath and the instructions compel her to honor her previous commitment, and to decide this case based upon the evidence presented in this trial and nothing else.
>
> I'm going to deny the motion for a mistrial. . . .

Subsequently, after a request from counsel, the trial court explained to the juror why information found in newspapers does not meet the evidentiary standards and again instructed her not to reveal the information to the other jurors. The jury resumed deliberations and eventually reached a verdict finding Jerome guilty on three counts of kidnapping, conspiracy to commit kidnapping, first-degree home invasion, and receiving and concealing stolen property; Jerome was found not guilty on three counts of armed robbery and one count of carjacking.

During deliberations, jurors may consider only the evidence presented in open court. *People v Budzyn*, 456 Mich

77, 88; 566 NW2d 229 (1997), writ granted *Nevers v Killinger*, 990 F Supp 844 (ED Mich, 1997). "'It is perfectly plain that the jury room must be kept free of evidence not received during trial and that its presence, if prejudicial, will vitiate the verdict.'" *People v Keeth*, 63 Mich App 589, 593; 234 NW2d 717 (1975), quoting *Dallago v United States*, 138 US App DC 276; 427 F2d 546, 553 (1969). "Where the jury considers extraneous facts not introduced in evidence, this deprives a defendant of his [or her] rights of confrontation, crossexamination, and assistance of counsel embodied in the Sixth Amendment." *Budzyn, supra* at 88. In determining whether reversal is required when inadmissible evidence that was not introduced during trial appears in the jury room during deliberations, this Court must determine "if the error might have operated to substantially injure the defendant's case." *People v Allen*, 94 Mich App 539, 543-544; 288 NW2d 451 (1980); see also *People v Clark*, 220 Mich App 240, 246; 559 NW2d 78 (1996). To establish that the extrinsic influence requires reversal, defendant must prove that the jury was exposed to an extraneous influence that created a "real and substantial possibility" that it could have affected the jury's verdict. *Budzyn*, *supra* at 88-89. To do so, defendant must show that the extraneous influence is "substantially related to a material aspect of the case and that there is a direct connection between the extrinsic material and the adverse verdict." *Id.* at 89. The burden then shifts to the prosecution to establish that any error is harmless. *Id.*

We find that the jury, or in this a case a juror, was exposed to extraneous influence that created a "real and substantial possibility" that the verdict was adversely affected. *Id.* The fact that the jury received the extraneous information and could not be relied on to follow instructions substantially injured Jerome's case. It is clear from the record that the juror relied on this highly prejudicial, extraneous,

information in reaching her decision with regard to defendant. The note from the juror revealed that the outside information she heard "prevented me from making a fair decision." At this point, the juror had already been instructed that the jury was to only consider evidence that was presented at trial, and her note reveals that she could no longer do this. The juror also responded that the information she had did not change her decision but "confirmed it." Clearly, the extraneous information influenced the juror's decision as it "confirmed" what she was already thinking.

The prosecution argues that mistrial motion was properly denied because jurors are presumed to follow the instructions when it comes to out of court conduct, and the fact that the juror recognized and affirmed the oath to only consider evidence presented in the case further supports that the instructions were followed. We have trouble believing that the juror would follow the trial court's instructions in this regard. The juror had already been provided the oath and the trial courts' instructions once, and she decided that what she knew prevented her from making a fair decision and "confirmed" what she was thinking. Also, the day before the juror received the information from her boss, the trial court had instructed "Don't let anybody come up to you and say, hey, I hear you're on the jury what's happening, or any of that. You need to be hermits for the weekend, but it's very important that you honor your commitment and those promises." The juror's statements to the court support that she heard more from her boss than she needed to, in that, she could have complied with the instructions and immediately told her boss that she was not supposed receive any information regarding the case. Although the juror claims she stopped her boss, her statements support that she could have stopped him before she did. We cannot now assume that the juror would follow the instructions given by the court to only

consider evidence presented at trial. Thus, there was a substantial extrinsic influence on the juror that was not cured by the trial court's instruction and the oath.

The extraneous influence was also substantially related to a material aspect of the case. The fact that a juror was informed that the other jury had found Reginald guilty on all counts and that Reginald had made a confession was highly prejudicial. The case against Jerome was built using a conspiracy theory, which involved Reginald. It is clearly material to know that Reginald was convicted on all counts, when the cases where built on a conspiracy. Evidence of a coconspirator's being found guilty and having made a confession is extremely prejudicial to a defendant on trial for the same conspiracy. See *United States v Maliszewski*, 161 F3d 992, 1004 (CA 6, 1998). And, even more related and prejudicial to Jerome's defense was that the information revealed that Reginald had a made a confession. Jerome's defense was that the jewelry store robbery was based on a plan that was executed by him, some people other than Reginald, and the Harringtons. Jerome's testimony and version of what happened did not include Reginald. This testimony informed the jury that Reginald had admitted to a crime, and contradicted Jerome's testimony. Thus, information regarding the confession significantly impaired Jerome's credibility. In addition, the trial court instructed the jury that if they concluded a witness deliberately lied about something important, it might choose not to accept anything the witness said. The information was related to the conspiracy and Jerome's credibility; both material aspects of the case. Lastly, the information was so prejudicial that the extrinsic material was directly connected to the adverse verdict. The unanimous verdict included the determination of the juror who indicated she could not come to a fair decision based on the outside information, and that this outside

information "confirmed" what she was already thinking. As noted above, the juror in question could not be relied on to properly follow trial court instructions.

We further note that in *Bruton v United States*, 391 US 123, 135-136; 88 S Ct 1620; 20 L Ed 2d 476 (1968), the United States Supreme Court held that a defendant is deprived of his right to confrontation when his codefendant's incriminating confession is introduced at their joint trial, even if the jury is instructed to consider that confession only against the codefendant. See also *Cruz v New York*, 481 US 186, 187-188; 107 S Ct 1714; 95 L Ed 2d 162 (1987). The *Bruton* Court stated that "[a] defendant may be prejudiced by the admission in evidence against a codefendant of a statement or confession made by that co-defendant," and that "this prejudice cannot be dispelled by cross-examination if the co-defendant does not take the stand." *Id.* at 132. The *Bruton* Court further stated:

> There are some contexts in which the risk that the jury will not, or cannot, follow instructions is so great, and the consequences of failure so vital to the defendant, that the practical and human limitations of the jury system cannot be ignored. Such a context is presented here, where the powerfully incriminating extrajudicial statements of a codefendant, who stands accused side-by-side with the defendant, are deliberately spread before the jury in a joint trial. Not only are the incriminations devastating to the defendant but their credibility is inevitably suspect, a fact recognized when accomplices do take the stand and the jury is instructed to weigh their testimony carefully given the recognized motivation to shift blame onto others. The unreliability of such

> evidence is intolerably compounded when the alleged accomplice, as here, does not testify and cannot be tested by cross-examination. [Id. at 135-136 (citations omitted).]

Additionally, the United States Supreme Court has held that the rule from *Bruton* applies even in the situation where the defendant has also confessed and his statement is "interlocking" with the codefendant's statement because of the "devastating" practical effect of codefendant testimony without cross-examination referenced in *Bruton*. *Cruz*, *supra* at 191-194. Justice Scalia, writing for the majority in *Cruz*, reasoned that usually a defendant tries to negate or avoid the consequences of a confession and the admission of a codefendant's custodial account that corroborates that confession presents a serious obstacle to that strategy. *Id.* at 192. Thus, the Court held that "where a nontestifying codefendant's confession incriminating the defendant is not directly admissible against the defendant, the Confrontation Clause bars its admission at their joint trial, even if the jury is instructed not to consider it against the defendant, and even if the defendant's own confession is admitted against him." *Id.* at 193 (internal citation omitted).

We note that *Bruton* violations do not automatically require reversal of defendants' convictions. *People v Banks*, 438 Mich 408, 427; 475 NW2d 769 (1991). Even where the *Bruton* rule is violated, the error may be considered harmless in certain circumstances. *Banks*, *supra* at 427. Thus, a defendant's confession "may be considered on appeal in assessing whether any Confrontation Clause violation was harmless." *Cruz*, *supra* at 193-194, citing *Harrington v California*, 395 US 250; 89 S Ct 1726; 23 L Ed 2d 284 (1969). If the evidence properly admitted against the defendant is so overwhelming and the prejudicial effect of

the codefendant's statement so insignificant by comparison, the improper admission of the statement is harmless beyond a reasonable doubt. *Banks*, *supra* at 427. See also *People v Harris*, 201 Mich App 147, 150; 505 NW2d 889 (1993).

In this case, a juror from Jerome's jury was made aware that Reginald had made a confession. Although not technically a *Bruton* violation, this irregularity has the same potential for prejudice as a *Bruton* violation does. The affect of a juror from Jerome's jury being made aware of Reginald's confession was "powerfully incriminating" because a confession Reginald was contrary to Jerome's testimony, thus, significantly diminished his credibility under these circumstances.[2] This irregularity is not harmless beyond a reasonable doubt. This is the type of situation where the risk that the juror did not follow the court's instructions was so great and the consequences were so vital to defendant, *Bruton, supra* at 135-136, that the error cannot be harmless beyond a reasonable doubt.

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[2] The negative impact of Jerome's juror being made of aware of Reginald's confession, is further supported in the United States Supreme Court's recent decision in *Crawford v Washington*, 541 US 36; 124 S Ct 1354; 158 L Ed 2d 177 (2004), which examines barring the use of a nontestifying codefendant's statement in a joint trial. In *Crawford*, the Court held that out-ofcourt statements that are testimonial in nature are barred under the Confrontation Clause where the declarant is unavailable, unless the defendant had a prior opportunity to cross-examine the witness. See *People v Bell (On Second Remand)*, 264 Mich App 58, 61-63; 689 NW2d 732 (2004).

For the above reasons the trial court abused its discretion in denying Jerome's motion for a mistrial because the irregularity was prejudicial to defendant's rights and impaired his ability to get a fair trial. We find that this trial violated Jerome's Sixth Amendment rights, and he is entitled to a new trial.[3]

However, we find that any error was harmless with regard to the receiving and concealing stolen property conviction. Reginald was not charged with this crime, and this crime was not inconsistent with Jerome's defense. Jerome and his counsel basically acknowledge that he committed this crime, and the defense was that the Harringtons were in on the crime, thus, he did not commit the more serious crimes. The prosecution has not met its burden in establishing that the error was harmless with regard to any of the other convictions. See *Budzyn, supra* at 89. As such, we affirm Jerome's conviction and sentence for receiving and concealing stolen property, but reverse the remainder of his sentences and convictions because the prejudicial information that entered the jury room vitiates the verdict with regard to these convictions. See *Keeth, supra* at 593.

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[3] Based on our resolution, it unnecessary to address the remainder of the issues Jerome raised on appeal.

III. Docket No. 255689

A. Venue

Reginald's first issue on appeal is that the venue, for his trial, should have been changed or at least there should have been a continuance. Basically, Reginald argues that he was denied a fair trial by an impartial jury because of pretrial publicity, and also argues that his trial counsel was ineffective in failing to move for a change of venue or a continuance. We disagree with both contentions.

1. Pretrial Publicity

Reginald claims that an impartial trial could not be held in Genesee County because of the pre-trial publicity. Most of the crimes, for which Reginald was charged, occurred in Genesee County. "It is the general rule that defendants must be tried in the county where the crime is committed. An exception to the rule provides that the court may, in special circumstances where justice demands or statute provides, change venue to another county." *People v Jendrzejweski*, 455 Mich 495, 499-500 (1997). MCR 2.221(A) provides that "[a] motion for change of venue must be filed before or at the time the defendant files an answer." Defendant did not request a change of venue or a continuance, and did not object to the impartiality of the impaneled jury at trial. Thus, we review this unpreserved issue for plain error affecting defendant's substantial rights. *People v Jones*, 468 Mich 345, 355-356; 662 NW2d 376 (2003).

"A defendant who chooses a jury trial has an absolute right to a fair and impartial jury." *People v Tyburski*, 445 Mich 606, 618; 518 NW2d 441 (1994). The initial question is whether the effect of pretrial publicity on the jury pool was such "unrelenting prejudicial pretrial publicity [that] the

entire community will be presumed both exposed to the publicity and prejudiced by it, entitling the defendant to a change of venue." *Mu'Min v Virginia*, 500 US 415, 442; 111 S Ct 1899; 114 L Ed 2d 493 (1991), citing *Irvin v Dowd*, 366 US 717, 727-728; 81 S Ct 1639; 6 L Ed 2d 751 (1961). "To resolve [such a] case," a reviewing court "must turn . . . to any indications in the totality of circumstances that petitioner's trial was not fundamentally fair." *Murphy v Florida*, 421 US 794, 799; 95 S Ct 2031; 44 L Ed 2d 589 (1975).

Here, Reginald has attached nothing to his appellate brief regarding the case - not a single newspaper story to support his contentions. There is no showing of any publicity that constituted unrelenting prejudicial pretrial publicity in Genesee County that is invidious or inflammatory. Regardless, the existence of pretrial publicity, standing alone, does not necessitate a change of venue. *People v Lee*, 212 Mich App 228, 253; 537 NW2d 233 (1995). Whether the jury was actually prejudiced by the publicity or whether there was an atmosphere that created a probability of prejudice must be considered. *Id.*

In *Tyburski, supra*, our Supreme Court held that when pretrial publicity creates a danger of prejudice, the trial court has several options to uncover potential juror bias and achieve the goal of impaneling an impartial jury. *Id.* at 623. One of these options is that the trial court can permit the attorneys to participate in the voir dire. *Id.* at 624. Another option is that the trial court can question individual potential jurors or small groups away from the remaining veniremen. *Id.* Whatever option the lower court selects, it must "elicit enough information for the court to make its own assessment of bias." *Id.* at 623. The Supreme Court opined that trial courts "should be allowed wide discretion in the manner they

employ to achieve the goal of an impartial jury." *Id.* (emphasis omitted).

In this case, the trial court attempted to achieve the goal of an impartial jury through voir dire. "The purpose of voir dire is to elicit enough information for development of a rational basis for excluding those who are not impartial from the jury." *Id.* "The trial court has discretion in both the scope and the conduct of voir dire." *Id.* at 619.

The record does not support defendant's claim that the trial court failed to ensure that the jury was impartial. To the contrary, the trial court was aware of the issue of pretrial publicity and took appropriate steps to impanel an impartial jury. Specifically, the trial court conducted individual, sequestered voir dire of the prospective jurors who had received some pretrial publicity and questioned them individually, to determine how much the potential jurors had heard or seen from the media and what impact that information would have on the jurors' ability to remain unbiased. In addition, apparently mindful of the fact that the "attorneys are more familiar with the complexities and nuances of the case" and "are in a better position than the trial court to ask in-depth questions designed to uncover hidden bias," the trial court also permitted the prosecutor and defense counsel to participate in the voir dire. *Id.* at 624.

The facts of this case are not similar to the facts in *Tyburski*, where the trial court did not sequester the prospective jurors to conduct individual voir dire and did not permit the attorneys to participate in the voir dire. *Id.* at 625-626. We conclude that the trial court, which was on notice of the likelihood of juror bias as a result of pretrial publicity, exercised caution in the manner it conducted voir dire. By conducting individual, sequestered voir dire and permitting

the attorneys to ask questions about bias as a result of media exposure, the trial court's conduct went above and beyond what our Supreme Court required in *Tyburski*. The trial court satisfied its duty "to conduct a thorough and conscientious voir dire designed to elicit enough information for the court to make its own assessment of bias." *Id.* Voir dire functioned exactly as it should have. There is nothing on the record supporting Reginald's claim that the trial court should have sua sponte changed venue or continued the trial for a later date. Reginald has presented no plain error affecting his substantial rights with regard to venue and the trial court's failure to enter a continuance sua sponte.

2. Ineffective Assistance of Counsel

Reginald also contends that he was denied the effective assistance of counsel where his attorney failed to move for a change of venue or a continuance. Because there was no *Ginther*[4] hearing, our review is limited to mistakes apparent on the record. *People v Sabin*, 242 Mich App 656, 658-659; 620 NW2d 19 (2000).

Defendant must satisfy a two-pronged test to show ineffective assistance of counsel: (1) that counsel's performance was below an objective standard of reasonableness under professional norms, and that (2) there is a reasonable probability that but for counsel's errors, the result would have been different, and the result that did occur

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[4] *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

was fundamentally unfair or unreliable. *People v Riley* (After Remand), 468 Mich 135, 140; 659 NW2d 611 (2003), citing *Strickland v Washington*, 466 US 668, 687; 104 S Ct 2052; 80 L Ed 2d 674 (1984). Further, defense counsel has wide discretion in matters of trial strategy, and "the defendant must overcome a strong presumption that counsel's performance constituted sound trial strategy." Id.; *People v Pickens*, 446 Mich 298, 325; 521 NW2d 797 (1994). An appellate court will not second-guess matters of strategy or use the benefit of hindsight when assessing counsel's competence. *Pickens*, supra at 330; *People v Rockey*, 237 Mich App 74, 76-77; 601 NW2d 887 (1999).

Limiting our review to errors apparent from the record, Reginald has not established that his trial counsel was ineffective. As noted, there is nothing on the record supporting pervasive pretrial publicity or prejudice with regard to Reginald. Here, the prospective jurors who had learned of the case from media coverage were questioned separately by the trial court and the attorneys to uncover any possible bias. Some of these prospective jurors were excused for cause for reasons other than pretrial publicity, while the remaining jurors indicated that they would be fair and impartial. The record does not show that a change of venue or a continuance was justified.

Further, the decision whether or not to move for a change of venue constitutes a matter of trial strategy, *People v Anderson*, 112 Mich App 640, 646; 317 NW2d 205 (1981), which we do not second guess on appeal, *Pickens*, supra at 330; *Rockey*, supra at 76-77. Defense counsel participated in questioning the jurors, used his peremptory challenges, and some potential jurors were dismissed for cause. It is apparent that defense counsel adequately questioned the jurors and determined that he could address potential prejudice through

the voir dire process. His decision not to move for a change of venue or a continuance was a matter of trial strategy and was not ineffective in light of his other efforts to alleviate prejudice. Moreover, there is no indication on record, in this case, that the pretrial publicity was inflammatorily prejudicial. See *Jendrzejweski*, supra at 506-509. As a result, we reject defendant's argument that he received ineffective assistance of counsel. See, generally, id. at 509-510.

B. Prosecutor's Opening Statement

Reginald next argues that he was denied a fair and impartial trial when, during opening statement, the prosecutor offered his personal opinion, implied first hand knowledge of Reginald's interrogation, and commented on Reginald's refusal to answer questions. Reginald also contends that he was denied the effective assistance of counsel when his trial counsel failed to object to the prosecution's opening statement. We disagree with both contentions.

1. Prosecutorial Misconduct

A claim of prosecutorial misconduct is a constitutional issue that is reviewed de novo. *People v Abraham*, 256 Mich App 265, 272; 662 NW2d 836 (2003). However, none of the issues raised are preserved and, therefore, we review the issues for plain error affecting substantial rights. See *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). Reversal is warranted only when a plain error resulted in the conviction of an actually innocent defendant or seriously affected the fairness, integrity or public reputation of judicial proceedings. *People v Walker*, 265 Mich App 530, 542; 697 NW2d 159 (2005). In addition, appellate relief is not warranted if a curative instruction could have eliminated any possible prejudice. *People v Noble*, 238 Mich App 647, 660;

608 NW2d 123 (1999).

The test of prosecutorial misconduct is whether the defendant was denied a fair and impartial trial. *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001). Prosecutorial misconduct issues are decided on a case-by-case basis and the reviewing court must examine the record and evaluate a prosecutor's remarks in context. *People v Thomas*, 260 Mich App 450, 454; 678 NW2d 631 (2004). The propriety of a prosecutor's remarks depends on all the facts of the case. *People v Rodriguez*, 251 Mich App 10, 30; 650 NW2d 96 (2002).

Reginald argues that the prosecutor offered his personal opinion of the facts in the case and vouched for Reginald's guilt by stating "It is my job to tell you the background." In addition, Reginald argues that the prosecution expressed first hand knowledge in using "I" and by stating that Reginald did not want to answer certain questions. Reginald's arguments lack merit.

Opening statement is the appropriate time to state the facts that will be proven at trial. *People v Johnson*, 187 Mich App 621, 626; 468 NW2d 307 (1991). A prosecutor may not vouch for the credibility of a witness to the effect that he has some special knowledge that the witness is testifying truthfully. *People v Bahoda*, 448 Mich 261, 276; 531 NW2d 659 (1995); *People v Knapp*, 244 Mich App 361, 382; 624 NW2d 227, (2001). But a prosecutor may argue from the facts that the defendant or another witness is worthy or not worthy of belief. *Thomas, supra* at 455.

A review of the challenged comments, in context, supports that the prosecutor was advising the jury of what evidence was going to be presented at trial, not that he was

vouching for Reginald's guilt. When the prosecutor was using the word "I," he was using it as Detective Dwyre speaking, and he made this clear to the jury. The prosecutor before going into the challenged statement stated that "this is Detective Dwyre speaking." In context, the prosecutor was explaining what the testimony would support regarding the statement given by Reginald. In addition, the trial court informed the jurors on more than one occasion that the statements of the attorneys are not evidence. Thus, with regard to the challenged statements, we find no plain error affecting Reginald's substantial rights.

Defendant further argues that it was error for the prosecutor to state that Reginald had refused to answer questions posed by the arresting officers. This contention is also without merit.

The constitutional privilege against self-incrimination and the right of due process restrict the use of a defendant's silence in a criminal trial. *People v Dennis*, 464 Mich 567, 573; 628 NW2d 502 (2001); *People v Sutton (After Remand)*, 436 Mich 575, 592; 464 NW2d 276 (1990). "Where a defendant's silence is attributable to an invocation of his Fifth Amendment right or a reliance on the *Miranda*[5] warnings, the use of his silence is error." *People v Schollaert*, 194 Mich App 158, 163; 486 NW2d 312 (1992). But a defendant who waived his rights during questioning may not preclude evidence of omissions in his statements as evidence of protected silence. *People v McReavy*, 436 Mich 197, 211-212; 462 NW2d 1 (1990); *People v Rice (On Remand)*, 235

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[5] *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

Mich App 429, 436; 597 NW2d 843 (1999). When a defendant speaks, a failure to answer a question does not invoke the right to silence and evidence of his omissions is admissible at trial. *Id.*

The prosecutor, in his opening statement, discussed the statement Reginald gave and that he declined to answer some of the questions while he was giving the statement. Viewed in context there was nothing improper in the prosecutor's statement, as it was not discussing any silence by Reginald that was attributable to invocation of his Fifth Amendment right or a reliance on *Miranda*. Instead, Reginald had waived his right to silence and these were questions that Reginald just decided not answer. In addition, the trial court informed the jury on more than one occasion that the statements of the attorneys were not evidence. As such, with regard to the challenged statements by the prosecution, we find no plain error affecting defendant's substantial rights.

2. Ineffective Assistance of Counsel

As discussed, *supra*, there is no merit to Reginald's contentions that the prosecutor's opening statements were improper. Counsel is not required to advocate a meritless position. *Riley, supra* at 142; *People v Mack*, 265 Mich App 122, 130; 695 NW2d 342 (2005). Accordingly, defendant has not established that he received ineffective assistance of counsel.

C. Personal Threat Evidence

Reginald next argues that he was denied a fair trial by the admission of testimony that a witness was afraid to testify when there was no evidence that defendant or anyone acting on his behalf caused her fear.

The decision whether to admit evidence is within the discretion of the trial court and will not be disturbed on appeal absent an abuse of discretion. *People v Katt*, 468 Mich 272, 278; 662 NW2d 12 (2003). An abuse of discretion is found only if an unprejudiced person, considering the facts on which the trial court acted, would say that there was no justification or excuse for the ruling made, *Walker*, *supra* 533, or the result is so palpably and grossly violative of fact and logic that it evidences a perversity of will, a defiance of judgment, or the exercise of passion or bias, *People v Hine*, 467 Mich 242, 250; 650 NW2d 659 (2002). A decision on a close evidentiary question ordinarily cannot be an abuse of discretion. *People v Sabin (After Remand)*, 463 Mich 43, 67; 614 NW2d 888 (2000). Furthermore, reversal is only required based on an evidentiary ruling if the error was prejudicial. *People v McLaughlin*, 258 Mich App 635, 650; 672 NW2d 860 (2003). However, if the court's decision involves a preliminary question of law, we review that decision de novo. *People v McDaniel*, 469 Mich 409, 412; 670 NW2d 659 (2003).

Generally, all relevant evidence is admissible, and irrelevant evidence is not. MRE 402; *People v Starr*, 457 Mich 490, 497; 577 NW2d 673 (1998); *People v Coy*, 258 Mich App 1, 13; 669 NW2d 831 (2003). Evidence is relevant if it has any tendency to make the existence of a fact that is of consequence to the action more probable or less probable than it would be without the evidence. MRE 401; *People v Crawford*, 458 Mich 376, 388; 582 NW2d 785 (1998); *People v Gonzalez*, 256 Mich App 212, 218; 663 NW2d 499 (2003). Under this broad definition, evidence is admissible if it is helpful in throwing light on any material point, *People v Aldrich*, 246 Mich App 101, 114; 631 NW2d 67 (2001), and all facts on which any reasonable presumption of the truth or the falsity of a charge can be founded are admissible, *People*

v Lewis, 264 Mich 83, 88; 249 NW 451 (1933). The credibility of witnesses is a material issue and evidence that shows bias or prejudice of a witness is always relevant. *People v Mills*, 450 Mich 61, 72; 537 NW2d 909 (1995), modified on other grounds 450 Mich 1212 (1995). To be material, evidence need not relate to an element of the charged crime or an applicable defense. The relationship of the elements of the charge, the theories of admissibility, and the defenses asserted govern relevance and materiality. *People v Brooks*, 453 Mich 511, 518; 557 NW2d 106 (1996); *People v Kevorkian*, 248 Mich App 373, 442; 639 NW2d 291 (2001).

Beginning in his opening statement, Reginald's counsel attacked Deborah's credibility regarding her description information of Reginald, and discussed her leaving things out when talking to the police. Reginald's counsel also noted in opening that the jury would hear information that may even point in the direction of the Harringtons.

The threatening phones calls were not raised during the prosecution's direct examination of Deborah. Jerome's counsel cross-examined Deborah in front of both juries regarding her withholding information from the police. The prosecutor asked to admit testimony that Deborah had been threatened over the phone, and was afraid for her family. Counsel for both Jerome and Reginald objected. After listening to arguments, the trial court agreed to allow testimony regarding the phone calls, but only with an instruction that the calls were not made by either Jerome or Reginald. Subsequently, during cross-examination of Deborah, Reginald's counsel asked her about not providing evidence to the police regarding a female and specifically asked about her and Leonard's fear. Deborah answered that they feared for their lives because of the threats and were told

not to give information. On redirect, the trial court allowed testimony to explain Deborah's reaction in that she had death threats over the telephone that made her reluctant to give the statements. Evidence of the threatening phone calls were significantly relevant to Deborah's credibility that had been attacked by Reginald's opening statement and on cross-examination.[6] This testimony was used to explain Deborah's reluctance to give further evidence to the police, thus, was relevant to her credibility.

Even if relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, misleading the jury, undue delay, waste of time, or needless presentation of cumulative evidence. MRE 403; *Sabin (After Remand), supra* at 58; *People v Houston*, 261 Mich App 463, 467; 683 NW2d 192 (2004). Any relevant evidence will be damaging to some extent. Unfair prejudice exists when there is a tendency that the evidence will be given undue or preemptive weight by the jury, or when it would beinequitable to allow use of the evidence. *People v McGuffey*, 251 Mich App 155, 163; 649 NW2d 801 (2002). The prejudicial effect of evidence is best determined by the trial court's contemporaneous assessment of the presentation, credibility and effect of the testimony. *Bahoda, supra* at 291.

The testimony was very probative because the case in

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[6] We note that the cross-examination may not have been as extensive if the trial court had not ruled to allow the testimony regarding the phone calls, but, regardless, the opening statement alone was enough to make the testimony relevant.

large part was based on credibility, and this testimony was significant to Deborah's credibility, which Reginald's counsel made an issue of in opening statement. The trial court minimized the prejudice by instructing the jury to accept as fact that neither Reginald nor Jerome made the calls. In addition, the testimony was not that prejudicial because Deborah had already alluded to threats in her testimony. This testimony helped to alleviate confusion. Further, as noted, Reginald's counsel made the matter relevant by raising issue with Deborah's credibility in opening statement. A party may not seek appellate relief based upon an evidentiary error to which he contributed by plan or negligence. *Gonzalez, supra* at 224. Without the testimony there may have been confusion as to whether threats were made by Reginald and Jerome. We find that the trial court did not abuse its discretion.

D. Prosecutor's Closing Argument

Reginald's final issue on appeal is that the prosecutor engaged in misconduct and denied him a fair trial when, during closing arguments, he distorted the burden of proof, vouched for his own opinion of the credibility of witnesses when he called Reginald a liar and stated that the complaining witnesses were telling the truth. We disagree.

We review Reginald's unpreserved claims of prosecutorial misconduct for plain error affecting his substantial rights. *Carines, supra*.

Reginald argues that the prosecutor distorted the burden of proof and vouched for his own opinion of the credibility by calling Reginald a liar when he said the case was about credibility and "who you believe. . . . Because somebody's

lying. That somebody is Reginald Montgomery." Basically, Reginald argues that the prosecutor improperly implied that the jurors had to decide whether to believe either defendant or the prosecution and invited the jury to disbelieve defendant's theory of the case, thus, forcing him to prove himself innocent and that this was also the prosecution vouching for Reginald's guilt and the credibility of the prosecution witnesses.

The prosecution is free to argue the evidence and all reasonable inferences arising from it as they relate to his theory of the case. *Bahoda, supra* at 282. He need not use the least prejudicial evidence available to establish a fact at issue, nor must he state the inferences in the blandest possible terms. *People v Aldrich*, 246 Mich App 101, 112; 631 NW2d 67 (2001).

Reading the comments in context, the prosecution was not distorting the burden or vouching for his opinion, but instead arguing that the evidence supported that the prosecution witnesses were credible and the defense witnesses were not. Our Supreme Court has stated "although a defendant has no burden to produce any evidence, once the defendant advances evidence or a theory, argument on the inferences created does not shift the burden of proof." *People v Fields*, 450 Mich 94, 115; 538 NW2d 356 (1995). "When a defense makes an issue legally relevant, the prosecutor is not prohibited from commenting on the improbability of the defendant's theory or evidence." *Id.* at 116. In light of the fact that defendant's version of the incident was wholly different from the prosecution's version, the prosecutor's comments regarding the fact that some of the witnesses had to be lying did not improperly shift the burden of proof to defendant nor did the comments improperly vouch for Reginald's guilt. In addition, even if error, any prejudice was cured by the trial

court instructing the jury on the burden and that the attorneys' statements are not evidence.

We affirm Reginald's convictions and sentences, affirm Jerome's conviction and sentence for receiving and concealing stolen property having a value of $20,000 or more, and reverse the remainder of Jerome's convictions and sentences and remand for a new trial.

/s/ Kathleen Jansen
/s/ Jane E. Markey

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee

UNPUBLISHED
November 22, 2005
No. 255641

v

JEROME EDWIN MONTGOMERY,

Defendant-Appellant.

Genesee Circuit Court
LC No. 03-012258-FC

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee

No. 255689

v

REGINALD EUGENE MONTGOMERY,

Defendant-Appellant.

Genesee Circuit Court
LC No. 03-012257-FC

SAAD, P.J., *(concurring in part and dissenting in part).*

I concur with the majority opinion in these consolidated matters with the exception of the majority's ruling on Jerome Montgomery's motion for a mistrial because of the issue surrounding juror number 9. Because I conclude that the trial judge did not abuse his discretion, I respectfully dissent from this portion of the majority's opinion.

I dissent for several reasons. After being advised of the jury's decision in the companion case and of the alleged confession, juror number 9 appropriately reported this to the trial court and upon questioning by the trial judge, juror number 9 assured the court that she did not share this information with the other jurors and, importantly, she advised the court that this information did not affect her decision about the case. Juror number 9 further assured the court that she could set aside the outside information and base her decision solely on the evidence presented at trial. Moreover, the entire jury was properly instructed and the trial court properly reminded juror number 9 of her obligation to decide the case on the evidence presented at trial.

Because this is a very close judgment call, on the record before us, I would not conclude that the trial court abused its discretion had the court granted a new trial, as I conclude that the court did not abuse its discretion in refusing to grant a new trial. Though we may have decided this issue differently, because of the deference granted the trial court by the *abuse of discretion* standard of review, I cannot conclude that the trial court abused his discretion and therefore, I would affirm the trial court's decision not to grant a new trial.

/s/ Henry William Saad

Order

Michigan Supreme Court

March 29, 2006

Lansing, Michigan

130332

PEOPLE OF THE
STATE OF MICHIGAN,
Plaintiff-Appellant,

v

JEROME EDWIN
MONTGOMERY,
Defendant-Appellee.

Clifford W. Taylor
Chief Justice
Michael F. Cavanagh
Elizabeth A. Weaver
Marilyn Kelly
Maura D. Corrigan
Robert P. Young, Jr.
Stephen J. Markman
Justices

SC: 130332
COA: 255641
Genesee CC: 03-012258-FC

/

On order of the Court, the application for leave to appeal the November 22, 2005 judgment of the Court of Appeals is considered and, pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we REVERSE that portion of the Court of Appeals judgment that pertains to this defendant for the reasons stated in the dissenting opinion, and REINSTATE defendant's convictions for kidnapping, conspiracy to kidnap, and first-degree home invasion. We REMAND this case to the Court of Appeals for consideration of the remaining issues that were raised by defendant, but not addressed by the court.

We do not retain jurisdiction.

KELLY, J., would deny leave to appeal.

[SEAL]

I, CORBIN R. DAVIS, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of Court.

March 29, 2006

/s/ Corbin R. Davis
Clerk

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

JEROME EDWIN MONTGOMERY,
Petitioner,

v.

BARRY D. DAVIS,
Respondent.

CASE NO. 2:06-CV-15758
HONORABLE JULIAN ABELE COOK, JR.

OPINION AND ORDER DENYING PETITION FOR WRIT OF HABEAS CORPUS

Petitioner Jerome Edwin Montgomery, a state inmate currently[1] incarcerated at the Newberry Correctional Facility

[1]When Petitioner originally filed his petition, he was incarcerated at the Chippewa Correctional Facility in Kincheloe, Michigan where Jeri Ann Sherry was the warden. Petitioner was subsequently transferred to the Newberry Correctional Facility where Barry D. Davis is the warden. The proper respondent in a habeas case is the petitioner's custodian, which in the case of an incarcerated habeas petitioner is the warden of the facility where the petitioner is incarcerated. *Edwards v. Johns*, 450 F.Supp.2d 755, 757 (E.D. Mich. 2006); Rule 2(a) of the Rules Governing Section 2254 Cases in the United States District Courts. Therefore, the Court substitutes warden Barry D. Davis in the caption.

in Newberry, Michigan, has filed a *pro se* petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. The petitioner was convicted by a jury in Genesee County Circuit Court of three counts of kidnapping, MICH. COMP. LAWS § 750.349, conspiracy to kidnap, MICH. COMP.LAWS § 750.159a, first-degree home invasion, MICH.COMP.LAWS § 750.110a, and receiving and concealing stolen property, MICH.COMP.LAWS § 750.535(2)(a). The state trial court sentenced Petitioner as a third-time habitual offender, MICH.COMP. LAWS § 769.11, to thirty to fifty years on the kidnapping convictions, a concurrent ten to twenty years on the receiving and concealing stolen property conviction, and a consecutive sentence of twelve to forty years on the home invasion conviction. Petitioner alleges that he is entitled to habeas relief because he was denied his right to an impartial jury in violation of the Sixth and Fourteenth Amendments. Respondent has filed an answer asserting that Petitioner is not entitled to habeas relief because the decision of the Michigan Supreme Court affirming his conviction was not contrary to clearly established Supreme Court precedent and did not involve an unreasonable determination of the facts in light of the evidence presented. The Court agrees, therefore, the petition for a writ of habeas corpus will be denied.

I. Background

This case arose from the robbery of a jewelry store in Novi, Michigan at which Deborah Harrington was the general manager. The prosecution argued that Petitioner, his brother Reginald Montgomery and others devised a plan under which they would force Ms. Harrington to accompany them to the jewelry store, have her unlock the doors and the safe and allow them to make off with valuable jewelry. In the process,

the prosecution contended that Petitioner and his co-conspirators broke in to the Harrington's home, held Ms. Harrington, her husband Leonard Harrington and her son Reid Adomat hostage at gunpoint, stole items from the Harrington's home, and stole over a million dollars in jewelry from the store. Petitioner and his brother Reginald were tried jointly with separate juries.

Petitioner's defense was that the Harringtons were co-conspirators and involved in the plan to rob the jewelry store. In contrast, Reginald confessed to his involvement in kidnapping the Harringtons and holding them hostage in their home but not to taking Ms. Harrington to the jewelry store. Reginald's confession was admitted outside of the presence of Petitioner's jury.

The juries for Petitioner and Reginald began to deliberate on Friday, March 26, 2004. Within three hours, Reginald's jury returned and convicted him on all counts charged: two counts of armed robbery, conspiracy to commit armed robbery, three counts of kidnapping, conspiracy to kidnap, first-degree home invasion, felon in possession of a firearm, possession of a firearm during the commission of a felony and car jacking. Petitioner's jury was still deliberating and the trial court decided to send them home for the weekend. The remaining facts that are relevant to Petitioner's single habeas issue were summarized by the Michigan Court of Appeals:

> Jerome's counsel requested that the jury be sequestered for the weekend, in light of the fact that information would be available through news sources regarding Reginald's convictions. The trial court denied counsel's request and allowed the

jury to go home for the weekend after giving specific instructions.

On March 29, 2004, Jerome's jury returned to deliberate. Subsequently, the trial court received two notes: one wanting to know what would happen if a decision could not be reached and, shortly after, a second note from a juror stating "At this point I feel I've heard too much outside information outside these deliberations that have prevented me from making a fair decision." Jury deliberations were suspended and the trial court brought the juror in to discuss the note. The juror explained:

> When I went to work on Saturday, my boss is aware that I'd been on jury duty, and he's aware of the case just because it's been on the news and the newspapers and that. I've never went over any details. But he had-when he come in, he says, so you guys have made a decision, thinking that I was the other juror-jury. And he said wow, it only took you guys like two hours.

The juror further stated that her boss had told her that Reginald was found guilty on all charges and that there was a confession made. The juror indicated that she stopped him at that time. She explained:

> And it didn't - it didn't really change my decision, it just confirmed it to a point where I wouldn't be able to discuss it, or - because there are so many people with other opinions. And there's other things going on as well.

Upon further questioning, the juror indicated that she had not provided the information to the other jurors. The trial judge asked the juror if, recognizing the oath, she could separate the information she received from the evidence, and could "continue to deliberate based upon the information received in this only, and set that other information aside?" The juror responded "Personally, yes, but I feel there's other people that cannot." When the trial court further questioned this response, the juror indicated that she did not know if other jurors had outside information that she did, but that the jury was "breaking rules that [the trial court] implied." The juror then explained the jury was not following rules on sympathy and emotions, and that "they're not using common sense."

Jerome's counsel requested that the trial court declare a mistrial because it would be unfair for the jury to continue on with the information regarding Reginald. The trial court denied the request stating:

> I think the law presumes that jurors follow

> the instructions of the Court when it comes to out-of-court conduct. And I think what we learned from juror number nine confirms that, and that is she did not seek out this information. It came to her in an inadvertent way.
>
> She recognized the oath that she took to decide this case based solely upon the evidence presented in this case. She affirmed that even though this outside information had come to her, that her oath and the instructions compel her to honor her previous commitment, and to decide this case based upon the evidence presented in this trial and nothing else.
>
> I'm going to deny the motion for a mistrial....

Subsequently, after a request from counsel, the trial court explained to the juror why information found in newspapers does not meet the evidentiary standards and again instructed her not to reveal the information to the other jurors. The jury resumed deliberations and eventually reached a verdict finding Jerome guilty on three counts of kidnapping, conspiracy to commit kidnapping, first-degree home invasion, and receiving and concealing stolen property; Jerome was found not guilty on three counts of armed robbery and one count of car jacking.

People v. Montgomery, No. 255641, 255689, 2005 WL 3116520 *3-4 (Mich. Ct. App. Nov. 22, 2005).

On appeal, Petitioner claimed that the trial court erred in denying his motion for a mistrial, relying on cases holding that the Sixth and Fourteenth Amendments guarantee criminal defendants a fair and impartial jury. A majority of the appellate court panel decided that the state trial court had abused its discretion in denying Petitioner's motion for a mistrial because juror nine's knowledge of the extraneous facts of co-defendant Reginald's confession and conviction impaired Petitioner's ability to receive a fair trial. *Id.*, * 4-6. The appellate court affirmed Petitioner's convictions for receiving and concealing stolen property but reversed his other convictions. Judge Saad dissented because he concluded that the trial court did not abuse its discretion in denying the motion for a mistrial:

> I dissent for several reasons. After being advised of the jury's decision in the companion case and of the alleged confession, juror number 9 appropriately reported this to the trial court and upon questioning by the trial judge, juror number 9 assured the court that she did not share this information with the other jurors and, importantly, she advised the court that this information did not affect her decision about the case. Juror number 9 further assured the court that she could set aside the outside information and base her decision solely on the evidence presented at trial. Moreover, the entire jury was properly

> instructed and the trial court properly reminded juror number 9 of her obligation to decide the case on the evidence presented at trial.
>
> Because this is a very close judgment call, on the record before us, I would not conclude that the trial court abused its discretion had the court granted a new trial, as I conclude that the court did not abuse its discretion in refusing to grant a new trial. Though we may have decided this issue differently, because of the deference granted the trial court by the abuse of discretion standard of review, I cannot conclude that the trial court abused his discretion and therefore, I would affirm the trial court's decision not to grant a new trial.

Id., * 14-15.

Respondent filed an application for leave to appeal with the Michigan Supreme Court raising one issue:

> Did the Court of Appeals clearly err and cause material injustice by holding that the trial court abused its discretion by denying [Petitioner's] motion for mistrial based on a deliberating juror's inadvertent contact with her employer who stated that a codefendant had been convicted and had confessed?

The Michigan Supreme Court issued an order "reversing that portion of the Court of Appeals judgment that pertains to [Petitioner] for the reasons stated in the

dissenting opinion" and reinstated Petitioner's convictions for kidnapping, conspiracy to kidnap, and first-degree home invasion. *People v. Montgomery*, 474 Mich. 1098 (2006). The Michigan Supreme Court remanded the case to the Court of Appeals for consideration of issues raised by Petitioner but not previously addressed by the Court of Appeals. *Id.* The Michigan Court of Appeals subsequently denied Petitioner's remaining claims and affirmed his convictions. *People v. Montgomery*, No. 255641, 2006 WL 1185385 (Mich. Ct. App. May 4, 2006).

Petitioner then filed a timely petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 and raises the same issue he raised in the Michigan Court of Appeals.

II. Standard of Review

Review of this case is governed by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"). Pursuant to the AEDPA, Petitioner is entitled to a writ of habeas corpus only if he can show that the state court's adjudication of his claims on the merits-

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d). Simply stated, under section 2254(d), Petitioner must show that the state court's decision "was either contrary to, or an unreasonable application of, [the Supreme] Court's clearly established precedents, or was based upon an unreasonable determination of the facts." *Price v. Vincent*, 538 U.S. 634, 639, 123 S.Ct. 1852-53 (2003).

A state court's decision is "contrary to" clearly established federal law "if the state court arrives at a conclusion opposite to that reached by [the Supreme] Court on a question of law or if the state court decides a case differently than [the Supreme] Court has on a set of materially indistinguishable facts." *Williams v. Taylor*, 529 U.S. 362, 412-13, 120 S.Ct. 1495, 1523 (2000). A state court's decision is an "unreasonable application of" clearly established federal law "if the state court identifies the correct governing legal principle from [the Supreme] Court's decisions but unreasonably applies that principle to the facts of the prisoner's case." *Id.* at 413, 120 S.Ct. 1523. A state court decision "based on a factual determination will not be overturned on factual grounds unless objectively unreasonable in light of the evidence presented in the state-court proceeding, § 2254(d)(2)." *Miller-El v. Cockrell*, 537 U.S. 322, 340, 123 S.Ct. 1029, 1041 (2003).

III. Discussion

The issue in this case is whether juror nine was impartial or irreparably prejudiced by receiving unsolicited information, outside of evidence admitted at trial, from her boss about Reginald's conviction and confession during jury deliberations over Petitioner's guilt or innocence. "The Sixth

and Fourteenth Amendments to the Constitution guarantee a criminal defendant the right to an impartial jury." *Wolfe v. Brigano*, 232 F.3d 499, 501 (6th Cir. 2000) (citing *Morgan v. Illinois*, 504 U.S. 719, 726-27 (1992)). "Due process does not require a new trial every time a juror has been placed in a potentially compromising situation." *Smith v. Phillips*, 455 U.S. 209, 217 (1982). "Due process means a jury capable and willing to decide the case solely on the evidence before it, and a trial judge ever watchful to prevent prejudicial occurrences and to determine the effect of such occurrences when they happen." *Id.*

> In a criminal case, any private communication, contact, or tampering, directly or indirectly, with a juror during a trial about the matter pending before the jury, is for obvious reasons, deemed presumptively prejudicial . . . . The presumption is not conclusive, but the burden rests heavily upon the Government to establish, after notice to and hearing of the defendant, that such contact with the juror was harmless to the defendant.

Remmer v. United States, 347 U.S. 227, 229 (1954) (citations omitted).

In this case, the state trial court held a hearing as *Remmer* instructs. After receiving the note from juror nine which indicated her feeling that outside information had prevented her from making a fair decision, the court found 1) that juror nine did not disobey court instructions while away from jury deliberations and that the information about Reginald came to her inadvertently; 2) that juror nine had not

shared the extraneous information with the other jurors; and 3) that juror nine could set aside the extraneous information and continue to deliberate based only upon the information received from the trial.

The question of whether a "juror's protestation of impartiality" should be believed is one of fact. *Patton v. Yount*, 467 U.S. 1025, 1036 (1984). A trial court's findings of fact on this issue are presumptively correct under 28 U.S.C. § 2254(d). *Smith*, 455 U.S. at 218. Petitioner has not presented evidence that calls into question the trial court's finding that juror number 9 was impartial.

Petitioner argues that the extraneous information was related to a material aspect of the case and was directly connected to the adverse verdict. Petitioner however presents no argument about the trial court's findings that juror number nine affirmed that she would set aside the extraneous information and decide the case solely on the evidence presented at trial. As the Supreme Court has stated:

> To hold that the mere existence of any preconceived notion as to the guilt or innocence of an accused, without more, is sufficient to rebut the presumption of a prospective juror's impartiality would be to establish an impossible standard. It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court.

Irvin v. Dowd, 366 U.S. 717, 723 (1961) (citations omitted).

In this case, the trial court acted appropriately in questioning the juror as to her ability to set aside the uninvited information from her boss. In *Patton*, due to pre-trial publicity, a juror stated during voir dire that he would need evidence to overcome his opinion that the defendant was guilty. *Patton*, 467 U.S. at 1030. The juror, who was challenged for cause, later stated in response to the question of whether he could set aside his opinion or would need evidence to change it: "I think I could enter it [the jury box] with a very open mind. I think I could . . . very easily." *Id.* at 1039. Another juror, also challenged for cause, said that she could put her opinion of the defendant's guilt aside "if she had to." *Id.* The trial court overruled the defendant's challenges and seated the first as a juror and the second as an alternate. Despite the ambiguous nature of the jurors' responses, the Supreme Court determined that "the ambiguity in the testimony of the cited jurors who were challenged for cause is insufficient to overcome the presumption of correctness owed to the trial court findings [of impartiality]." *Id.* at 1040.

There was no ambiguity in juror nine's testimony that she could set aside the extraneous information and decide the case solely on the evidence presented at trial. The trial court was entitled to rely upon her assurances of impartiality. *Hughes v. United States*, 258 F.3d 453, 459- 60 (6th Cir. 2001) (discussing cases in which courts rehabilitate jurors who can expressly disclaim an earlier admission of bias against a defendant). This case fits easily into the precedent of *Patton*. The Michigan Supreme Court's decision is entirely consistent with federal law as established by the United States Supreme Court, and is not based upon an unreasonable

determination of the facts in light of the evidence presented. Petitioner is not entitled to habeas relief.

IV. CONCLUSION

Accordingly, it is hereby ORDERED that Petitioner's application for a writ of habeas corpus is DENIED.

/s/Julian Abele Cook, Jr.
JULIAN ABELE COOK, JR.
UNITED STATES DISTRICT
JUDGE

Date: September 2, 2009

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

JEROME EDWIN MONTGOMERY,
Petitioner,

v.

BARRY D. DAVIS,
Respondent.

CASE NO. 2:06-CV-15758
HONORABLE JULIAN ABELE COOK, JR.

/

OPINION AND ORDER DENYING CERTIFICATE OF APPEALABILITY AND GRANTING PERMISSION TO PROCEED WITH AN APPEAL IN FORMA PAUPERIS

Petitioner Jerome Edwin Montgomery, a state inmate currently incarcerated at the Newberry Correctional Facility in Newberry, Michigan, filed a *pro se* petition for a writ of habeas corpus under 28 U.S.C. § 2254. On September 2, 2009, the court denied the petition. Petitioner has now filed a Notice of Appeal and an Application to Proceed with An Appeal In Forma Pauperis.

Before a petitioner may appeal a court's dispositive decision denying a petition for a writ of habeas corpus, a certificate of appealability must issue. 28 U.S.C. § 2253(c)(1)(A); Fed. R. App. P. 22(b). Even if a petitioner does not file a request for a certificate of appealability, upon the filing of a notice of appeal, the district court must either

issue a certificate of appealability indicating the issues that satisfy the required showing or provide reasons why such a certificate should not issue. 28 U.S.C. § 2253(c)(3); Fed. R. App. P. 22(b); *Castro v. United States*, 310 F.3d 900, 901-03 (6th Cir. 2002) (per curiam).

When a habeas petitioner seeks permission to initiate appellate review of the dismissal of a petition, a federal court should limit its examination to a threshold inquiry into the underlying merit of his claims. *Miller-El v. Cockrell*, 537 U.S. 322, 336-37 (2003). A certificate of appealability may be issued "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). The substantial showing threshold is satisfied when a petitioner demonstrates "that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

In his habeas petition, Petitioner argued that he is entitled to habeas relief because he was denied his right to an impartial jury in violation of the Sixth and Fourteenth Amendments. The state court of appeals found the question of whether the state trial court abused its discretion in refusing to declare a mistrial based upon alleged juror bias to be a close one. This court denied habeas relief to Petitioner because he failed to overcome the presumption that the state trial court's finding that the challenged juror could proceed impartially was correct. The court concludes that reasonable jurists could not debate the court's conclusion that the petition does not present any claim upon which habeas relief may be granted because the state court decisions were

entirely consistent with federal law as established by the United States Supreme Court, and were not based upon an unreasonable determination of the facts in light of the evidence presented. *Dockins v. Hines*, 374 F.3d 935, 938 (10th Cir. 2004) (AEDPA deferential review of state court decisions is incorporated into consideration of request for certificate of appealability) (citing *Miller-El*, 537 U.S. at 349-50) (Scalia, J., concurring)); *see also Miller-El*, 537 U.S. at 336 ("We look to the District Court's application of AEDPA to petitioner's constitutional claims and ask whether that resolution was debatable amongst jurists of reason."). Therefore, the court declines to issue a certificate of appealability.

Petitioner has filed an Application to Proceed with an Appeal in forma pauperis. This court granted Petitioner leave to proceed in forma pauperis in the district court. Federal Rule of Appellate Procedure 24(a)(3)(A) provides that a party who was permitted to proceed in forma pauperis in the district-court action "may proceed on appeal in forma pauperis without further authorization, unless the district court – before or after the notice of appeal is filed - certifies that the appeal is not taken in good faith." *See also* 28 U.S.C. § 1915(a)(3) (An appeal may not be taken in forma pauperis if the court determines that it is not taken in good faith). The standard governing the issuance of a certificate of appealability is more demanding than the standard for determining whether an appeal is in good faith. *Walker v. O'Brien*, 216 F.3d 626, 631 (7th Cir. 2000). "[T]o determine that an appeal is in good faith, a court need only find that a reasonable person could suppose that the appeal has some merit." *Id.* at 632. While the court has held that reasonable

jurists would not find the court's decision that the petition lacked merit to be debatable or wrong, the court finds that an appeal may be taken in good faith. The court, therefore, will grant the Application to Proceed with an Appeal In Forma Pauperis.

Accordingly, the court DENIES a Certificate of Appealability and GRANTS the Application to Proceed with an Appeal *In Forma Pauperis*.

SO ORDERED.

/s/Julian Abele Cook, Jr.
JULIAN ABELE COOK, JR.
UNITED STATES DISTRICT
JUDGE

Dated: October 27, 2009

No. 09-2257

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
MAY 13, 2010
Leonard Green, CLERK

JEROME MONTGOMERY,

Petitioner-Appellant,

v.

ORDER

BARRY D. DAVIS, Warden,

Respondent-Appellee.

Jerome Montgomery, a Michigan prisoner proceeding through counsel, appeals a district court judgment denying his petition for a writ of habeas corpus filed pursuant to 28 U.S.C. § 2254. Montgomery has filed an application for a certificate of appealability ("COA") with this court.

Montgomery was convicted in a Michigan state court of three counts of kidnapping, conspiracy to kidnap, first-degree home invasion, and receiving and concealing stolen property. He was sentenced as a habitual offender to thirty to fifty years of imprisonment on the kidnapping convictions and ten to twenty years of imprisonment on the receiving and concealing conviction, to be served concurrently. Montgomery was also sentenced to twelve to forty years of imprisonment on the home invasion conviction, to be served consecutively.

Montgomery appealed his convictions and sentences to

the Michigan Court of Appeals. The Court of Appeals reversed his convictions and sentences on all counts except the receiving and concealing stolen property count, on the ground that one of the jurors in Montgomery's trial had been exposed to extrinsic information rendering her unable to render a fair and impartial verdict. *People v. Montgomery*, No. 225641/255869, 2005 WL 3116520, at *7 (Mich. Ct. App. Nov. 22, 2005) (per curiam). Judge Saad dissented, finding that the juror promptly reported the outside information to the trial court and assured the court of her ability to "set aside the outside information and base her decision solely on the evidence presented at trial." *Id.* at 14 (Saad, J., dissenting). The Michigan Supreme Court reversed, adopting the reasoning of Judge Saad's dissent. *People v. Montgomery*, 711 N.W.2d 82, 82 (Mich. 2006).

Montgomery filed the instant petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. He raised a single ground for relief, asserting that the trial court erred when it declined to grant him a mistrial after a juror was exposed to extraneous evidence, impairing her ability to render a fair and impartial verdict. The warden filed a response. The district court denied the petition, finding that the Michigan Supreme Court's decision was consistent with clearly established federal law as decided by the Supreme Court. The district court also denied a COA.

A COA is issued only "if the applicant has made a substantial showing of the denial of a constitutional right." *See* 28 U.S.C. § 2253(c)(2). A petitioner may meet this standard by showing that reasonable jurists could debate whether the petition should have been determined in a different manner, *Banks v. Dretke*, 540 U.S. 668, 705 (2004), or that the issues presented were "adequate to deserve encouragement to proceed further." *Slack v. McDaniel*, 529

U.S. 473, 484 (2000).

Montgomery claims that he was entitled to a mistrial because a juror received extrinsic information in his case. Specifically, one of the jurors learned from her boss over a weekend recess in the trial that Montgomery's co-defendant had confessed and had been convicted of all charges.

The trial court conducted a hearing in which the juror indicated that the information had not changed her mind, but had only confirmed her decision. The trial court specifically asked whether she would be able to set aside the outside information and come to a decision solely on the basis of the evidence presented, and she answered that she could. The district court analyzed the petition under the standard of the Antiterrorism and Effective Death Penalty Act ("AEDPA"), and concluded that the Michigan Supreme Court's decision was consistent with clearly established federal law. Under the AEDPA, a district court may grant a writ of habeas corpus only if the state court's decision was: (1) "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court"; or (2) "based on an unreasonable determination of facts in light of the evidence presented" during the state court proceedings. 28 U.S.C. § 2254(d). The state court's findings of fact are presumed to be correct and may be disturbed only if the petitioner shows through clear and convincing evidence that they are incorrect. *White v. Mitchell*, 431 F.3d 517, 524 (6th Cir. 2005).

The Supreme Court has held that any private communication with a juror in a criminal case concerning the matter pending before the jury is "presumptively prejudicial." *Remmer v. United States*, 347 U.S. 227, 229 (1954). The presumption, however, is rebuttable; "the remedy for

allegations of juror partiality is a hearing in which the defendant has the opportunity to prove actual bias." *Smith v. Phillips*, 455 U.S. 209, 215 (1982).

The relevant question is "did a juror swear that he could set aside any opinion he might hold and decide the case on the evidence, and should the juror's protestation of impartiality have been believed." *Patton v. Yount*, 467 U.S. 1025, 1036 (1984). Even an ambiguous answer as to the juror's ability to fairly deliberate is sufficient. *See id.* at 1040. We have held that the state courts did not engage in an unreasonable application of federal law in upholding a defendant's conviction where the trial court held a hearing and obtained reassurance from the affected jurors that they could deliberate fairly. *See Carroll v. Renico*, 475 F.3d 708, 712 (6th Cir. 2007).

Here, the trial court conducted a hearing and obtained reassurance from the juror that she could continue to deliberate fairly. Accordingly, in light of the foregoing precedent, reasonable jurists could not disagree with the district court's conclusion that the Michigan Supreme Court's conclusion was not contrary to or an unreasonable application of clearly established federal law.

We deny the application for a COA.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green
Clerk